

2012 IL App (2d) 101176-U
No. 2—10—1176
Order filed February 21, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JONATHON POGUE and)	Appeal from the Circuit Court
SANDRA POGUE,)	of Lake County
)	
Plaintiffs-Appellee,)	
)	No. 09 L 0056
v.)	
)	
GURNEE 41 CITGO, INC., an)	Honorable
Illinois Corporation,)	Christopher C. Starck
)	Judge, Presiding.
Defendant-Appellant.)	

JUSTICE BIRKETT delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: The appellate court had jurisdiction to review this breach of contract action where the initial judgment entered by the trial court was nonfinal in nature and defendant timely appealed from the final order in this case. Also, the trial court abused its discretion in barring all defense witnesses from testifying at trial based upon defendant's failure to disclose its witnesses to plaintiffs when: (1) defendant did not violate the terms of the case management order; and (2) even if such a violation had occurred, the sanction was not warranted against all defense witnesses when plaintiffs had already taken two depositions of defendant's witnesses. Accordingly, the trial court's order barring all defense witnesses from testifying at trial was reversed and the cause was remanded for a new trial.

¶ 1 Defendant, Gurnee 41 Citgo, Inc., appeals from the judgment of the trial court awarding plaintiffs, Jonathon and Sandra Pogue, \$120,000 in damages for a breach of contract action. On appeal, defendant argues: (1) the trial court abused its discretion when it barred all defense witnesses from testifying at trial; and (2) the trial court's order finding that defendant breached the contract was against the manifest weight of the evidence. In response, plaintiffs argue that this court lacks jurisdiction to hear defendant's appeal. For the following reasons, we find: (1) this court has jurisdiction over defendant's appeal; and (2) the trial court abused its discretion in barring all defense witnesses from testifying at trial. Accordingly, we reverse the trial court's order barring all defense witnesses from testifying trial and we remand this cause for a new trial.

¶ 2

I. FACTS

¶ 3 The record reflects that plaintiff Jonathon Pogue is the president of A+ Landscaping, Inc., and River Valley Gardens, Inc. He and his wife, co-plaintiff Sandra Pogue, owned property that was contiguous to the Village of Gurnee (Village). Defendant Gurnee 41 Citgo owned land that was adjacent to plaintiff's land, but was not contiguous to the Village. Defendant's business was managed by Thomas Chummar.

¶ 4 Defendants could not annex into the Village without plaintiffs' cooperation because its land was not contiguous to the Village. Therefore, on July 6, 2005, the parties entered into a contract entitled, "Agreement Between Adjoining Landowners Chummar and Pogue." The agreement provided plaintiffs with certain benefits to be provided by defendant in consideration for plaintiffs' participation and cooperation in the annexation of both parties' properties into the Village. Generally, the contract provided that in exchange for plaintiffs' cooperation with defendant in the annexation process, defendant would: (1) pay plaintiffs \$20,000; (2) install water and sewer lines

to plaintiffs' property within two years of signing an annexation agreement with the Village (the annexation agreement was signed on June 12, 2005); and (3) allow plaintiffs to use a portion of defendant's land to store plaintiffs' landscape materials for a period of 25 years.

¶ 5 On January 22, 2009, plaintiffs filed suit for breach of contract. In the complaint, plaintiffs alleged that they had fulfilled all their obligations under the agreement, but that defendant had failed to complete the installation of the water and sewer lines. Plaintiffs also alleged that defendant had made it impossible for plaintiffs to use the portion of defendant's land described in the agreement for storage of plaintiffs' landscape materials because defendant had converted that location to a compensatory water storage area. As a result of these breaches plaintiffs requested damages in the amount of \$188,820 plus attorneys fees and costs.

¶ 6 On May 21, 2009, the trial court entered an order entitled, "Supreme Court Rule 218 Order" The order itself was a pre-printed form with various dates written onto the form. That order provided, in pertinent part:

¶ 7 "(c) Plaintiff(s) shall disclose the identity of all Rule 213(f) information not later than 7/24, 2009.

¶ 8 (d) Defendant(s) shall disclose the identity of all Rule 213(f) information not later than 9/25, 2009.

¶ 9 (e) Cross-Defendants, Counter Defendants and Third-Party Defendants shall disclose the identify of all Rule 213(f) information not later than 10/9, 2009.

¶ 10 (f) Plaintiff(s) shall disclose the identity of any and all rebuttal witness information under Rule 213(f) not later than 10/30, 2009.

¶ 11 (g) all discovery shall be completed not later than 11/31 [sic], 2009."

¶ 12 In that order, a subsequent Supreme Court Rule 218 case management conference was set for status on June 18, 2009. See Ill. S. Ct. R. 218 (eff. Oct. 4, 2002). The order did not contain any specific language regarding a deadline for the disclosure of witnesses. The case was set for trial on January 25, 2010.

¶ 13 On July 15, 2009, plaintiffs filed a motion for default on the ground that defendant had failed to answer the complaint. On August 31, 2009, the court entered a new Rule 218 order. Ill. S. Ct. R 218 (eff. Oct. 4, 2002). The same form was used as the previous order, but some of the discovery dates had been changed. Specifically, defendant was given until October 18, 2009 to “disclose the identity of all Rule 213(f) information.” All discovery was to be completed by the end of November 2009, and the date for trial remained January 25, 2010. At the bottom of the order the trial court noted that plaintiffs’ motion for default was continued to September 8, 2009. On that date, plaintiffs’ motion for default was continued to September 14, 2009 by an agreed order.

¶ 14 On September 14, 2009, the court entered an order granting plaintiffs leave to file an amended complaint, extended the time for plaintiffs to disclose 213(f) information, and again continued plaintiff’s motion for default.

¶ 15 Plaintiffs filed an amended complaint on September 24, 2009, increasing their request for damages to \$216,570 plus attorneys fees and costs. On November 17, 2009, the court entered an order granting defense counsel’s oral motion to withdraw and gave defendant 21 days to find counsel. Plaintiffs’ motion for default was again continued.

¶ 16 On December 3, 2009, new defense counsel filed an appearance and answered the amended complaint. On December 9, 2009, the court entered an order indicating that plaintiffs had withdrawn their motion for default, and the parties were ordered to schedule a pre-trial conference. On

December 18, 2009, an order by the court indicates that a pre-trial conference had been conducted, and the matter was continued for status to January 20, 2010. On January 20, 2010, the trial court ordered that the parties had 60 days to complete discovery. The court also struck the original trial date and reset the trial for June 1, 2010. In February 2010, plaintiffs took the depositions of Thomas Chummar, president of defendant corporation, and defendant's contractor, Peter Zasadzien.¹

¶ 17 On May 11, 2010, plaintiffs filed a motion to bar all defense witnesses from testifying at trial. In the motion, plaintiffs alleged that on May 21, 2009, the court entered a Supreme Court Rule 218 order that provided in part that defendant's Rule 213(f) disclosures were to be made no later than September 25, 2009. Ill. S. Ct. R. 218 (eff. Oct. 4, 2002); Ill. S. Ct. R. 213 (eff. Sept. 1, 2008). Plaintiffs noted that disclosure deadlines were extended from time to time and that the court extended discovery until March 21, 2010, after defendant's current counsel was given leave to file his appearance on January 20, 2010. Finally, plaintiffs alleged that defendant had failed to disclose any witnesses, and he should therefore be barred from calling any witnesses so that plaintiffs could adequately prepare for trial. After a hearing on the motion, the trial court granted plaintiffs' motion to bar defendant from calling witnesses at trial.

¶ 18 On May 25, 2010, defendant filed a motion to reconsider the trial court's order barring his witnesses at trial. In his motion defendant argued that the sanction of striking the testimony of all defense witnesses was too harsh since the violation was minor and the testimony of those witnesses was very important to defendant's case. Defendant also argued that plaintiffs could not claim surprise as to defense witnesses' testimony because Chummar and Zasadzien had already been deposed in this matter.

¹Although the transcripts of these depositions were struck from the record on appeal on plaintiffs' motion, plaintiffs admit in their brief that these depositions were taken in February 2010.

¶ 19 On the same day, plaintiffs filed a response to defendant's motion for reconsideration. In its motion plaintiffs argued that defendant had violated two Supreme Court Rule 218 case management orders entered by the court on May 21, 2009 and August 31, 2009. Ill. S. Ct. R. 218 (eff. Oct. 4, 2002). Plaintiff argued that defendant had been afforded ample opportunity by the court to disclose witnesses and had failed to do so, that plaintiffs would be prejudiced if defendant were allowed to disclose witnesses on the eve of trial, and that the only argument defendant offered at the hearing on the motion to bar defendant's witnesses was that he did not know that he needed to disclose witnesses. On June 1, 2010, the court denied the motion to reconsider. The court also denied an oral motion for a Supreme Court Rule 304(a) finding and ordered the case to proceed to trial. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 20 The trial commenced on June 1, 2010 and took two days to complete. After the court had allowed plaintiffs to present their case it ruled that defendant had breached the agreement between the parties. Specifically, the court said:

“All right. The court has heard the evidence in this case, heard the arguments of counsel partly in chambers and partly in court and the court finds that the defendant has breached this contract and based upon the breach I'm finding the damages are in the amount of \$200,000. I've also been advised that the defendant is in the process of conducting and contracting for the sewer and water to be completed in short order and that is the large part of these damages. Therefore I'm going to stage – I'm going to stall the recovery and enforcement of the judgment so there will be \$80,000 will be stayed, that enforcement for 30 days and the balance will be stayed for 90 days at which time if the defendant can demonstrate that there has been established a location on the defendant's current property

where his business now sits, Gurnee 41 Citgo for the storage of the materials, the court would stay the enforcement of the additional sum that the court feels is due for off-site rent which is \$500 a month for \$150,000 total.

What will remain will be the attorney's fees and I am finding that the defendant is responsible for the attorney's fees because of the breach and the current storage off-site storage of \$500 a month. Both of those matters can be negotiated and should be negotiated but the lion's share of this can and should be resolved within 90 days."

¶ 21 That same day the court entered a written order. That order provided, in pertinent part:

"The court finds that Defendant is in breach of the contract and awards damages to Plaintiffs in the sum of \$200,000.

Enforcement of said judgment is stayed in full for a period of 30 days and this matter is set for status on July 7, 2010 at 9:00 a.m. to determine the status of the installation of sewer and enforcement of the balance of the judgment is stayed for an additional 60 days and this matter is set for status September 7, 2010 at 9:00 a.m., to determine the status of accommodation having been made in regard to the storage area, attorney's fees and costs of offsite storage."

¶ 22 On July 7, 2010, the court continued the matter to September 7, 2010. On September 7, 2010, the court ordered: (1) the stay on the judgment from June 2, 2010 was lifted; (2) defendant was given leave to file its motion to vacate and reconsider and for judgment in favor of defendant pursuant to 735 ILCS 5/2—1203(a); and (3) plaintiffs were given 21 days to respond to defendant's motion. Defendant filed a motion to vacate and reconsider, and plaintiffs filed their response to that motion.

¶ 23 On November 10, 2010, after a hearing, the trial court entered an order denying defendant's motion to vacate and reconsider and for judgment in favor of defendant. In its memorandum order, the trial court found that on June 2, 2010, it found defendant in breach of the contract between the parties in that: (1) defendant failed to install water and sewer lines to plaintiffs' property; and (2) after the effective date of the agreement defendant had changed the grading and character of a portion of defendant's property that was leased to plaintiff, with the result that the property was useless to plaintiff for the purpose intended.

¶ 24 The court found that the order entered on June 2, 2010, was a final order, and that it reserved jurisdiction of only the following specific matters: (1) defendant's installation of water and sewer lines to plaintiffs' property within a period of 30 days thereafter; (2) whether defendant accommodated plaintiffs' loss of the leased property within 90 days from judgment. The court then found that defendant had completed the installation of sewer and water lines within the 30 day period of stay, but that the defendant had failed to make a reasonable accommodation with regard to the leased portion of defendant's property. Therefore, the court ordered that the sum of \$80,000 of the total damages awarded in the June 2, 2010 judgment was vacated, and that any stay in regard to the enforcement of the remaining balance of \$120,000 of the June 2, 2010 judgment was lifted and that the judgment was immediately enforceable. Finally, the court found: (1) defendant's motion, as it pertained to rehearing, reconsideration and modification of the judgment on the grounds of error in the application of law or in the computation of damages was not timely pursuant to section 1203 (a) of the code of civil procedure (Code) (735 ILCS 5/2-1203(a) (West 2010)); and (2) defendant's motion failed to meet the requirements for obtaining relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)).

¶ 25

III. ANALYSIS

¶ 26 On appeal, defendant argues: (1) the trial court abused its discretion when it barred all defense witnesses from testifying at trial; and (2) the trial court's order finding that defendant breached the contract was against the manifest weight of the evidence. In response, plaintiffs argue that this court lacks jurisdiction to hear defendant's appeal. We will first address plaintiffs' jurisdictional claim.

¶ 27

A. Appellate Jurisdiction

¶ 28 Plaintiffs argue that the trial court's June 2, 2010 order constituted a final judgment on the merits of the case. Therefore, plaintiffs claim, defendant should have filed his notice of appeal within 30 days of the entry of that judgment order, and it did not. See Ill. S. Ct. R. 303(a) (eff. May 30, 2008). Instead, it filed a motion to reconsider several months after the final judgment, and the notice of appeal was filed on November 17, 2010, more than four months late.

¶ 29 In response, defendant contends that the trial court's order dated June 2, 2010 was not a final order because the court retained jurisdiction for the purpose of possibly modifying the judgment. Plaintiffs claim that the statements the trial court made on the record at the close of trial make it clear that the court was still expecting performance under the contract and that is why the judgment was stayed. Specifically, defendant references the trial court's statement regarding the installation of the water and sewer lines post-trial, as well as whether defendant would provide plaintiff with a different location on defendant's property for plaintiff to use outdoor storage. With regard to the latter issue, as well as attorney's fees, the court said, "[b]oth of those matters can be negotiated and should be negotiated but the lion's share of this can and should be resolved within 90 days." According to defendant, the judgment did not become final and appealable until the trial court entered its final

order on November 10, 2010, when it vacated \$80,000 of the total damages awarded to plaintiff on June 2, 2010, and modified the damage amount from \$200,000 to \$120,000.

¶ 30 Supreme Court Rule 301 provides that every final judgment of a circuit court in a civil case is appealable as of right. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Supreme Court Rule 303 governs the timing of an appeal from a final judgment of the circuit court. Ill. S. Ct. R. 303 (eff. May 30, 2008). Subsection (a)(1) of that rule provides that a notice of appeal must be filed within 30 days after the entry of the final judgment appealed from or, if a timely post-judgment motion is filed, within 30 days after the entry of the order disposing of the last pending post-judgment motion. Ill. S. Ct. R. 303(a)(1) (eff. May 30, 2008). “A final judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit.” *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33 (2005). A judgment is final if it determines the litigation on the merits so that, if affirmed, the only thing left to do is to proceed with execution of the judgment. *Lamar Whiteco Outdoor Corporation v. City of West Chicago*, 395 Ill. App. 3d 501, 504-505 (2009).

¶ 31 As support for their position that this court lacks jurisdiction to hear defendant’s appeal plaintiffs cite to *Prairie Material Sales, Inc. v White Diamond, Inc.*, 157 Ill. App. 3d 779, 781-82 (1987). In *Prairie Material Sales*, the plaintiff brought a breach of contract action against the defendant to recover money that defendant allegedly owed for materials supplied by plaintiff pursuant to a subcontract defendant had with a general contractor, W.W.I. Corporation (W.W.I.). W.W.I. was not a party to the cause of action. The parties entered into an agreed order whereby judgment was entered in plaintiff’s favor against defendant for \$6,214.89. However, a provision of the order provided, “[e]nforcement of the judgment is stayed until such time as White Diamond, Inc.,

is paid money from W.W.I. Corporation, at which time White Diamond, Inc. is ordered to pay the first \$6,214.89 of sums it receives from W.W.I. to Prairie Material Sales, Inc., in satisfaction of the judgment.” *Prairie Material Sales*, 157 Ill. App.3d at 781-81.

¶ 32 When W.W.I. did not pay the defendant for nine months after the judgment was entered, plaintiff moved to amend the agreed order to strike and delete that portion of the order that stayed enforcement of the judgment until defendant was paid by W.W.I. The trial court granted plaintiff’s motion. In reversing the trial court order’s granting plaintiff’s motion to amend the agreed order, the appellate court first held that the agreed order was a final order, despite the fact that it contained a stay provision, because the stay related only to the execution of the judgment and not to its merits. *Prairie Material Sales*, 157 Ill. App. 3d at 781.

¶ 33 This case is dissimilar to the facts in *Prairie Material Sales*. Here, the June 2, 2010 judgment did not simply stay the execution of the judgment. Instead, the trial court made it very clear that the portion of the judgment awarding plaintiffs \$200,000 in damages was stayed pending possible modifications at both 30 and 90 days after the June 2, 2010 order. See *In re Guzik*, 249 Ill. App. 3d 95, 98 (1993) (a judgment is not final, nor immediately appealable, where the court reserves an issue for further consideration or otherwise manifests an intention to retain jurisdiction for the entry of a further order).

¶ 34 Here, the record reflects that at the time the court entered the order finding defendant in breach of the agreement it knew that defendant was currently constructing water and sewer lines as required under the contract. For this reason, the trial court gave the parties additional time for defendant to comply with the terms of the agreement by: (1) finishing the water and sewer lines; and (2) finding another location on defendant’s property to allow plaintiffs to store their landscape

materials as required under the contract. Defendant's compliance with the installation of the water and sewer lines dramatically reduced the damage award in this case and modified the judgment. This was not a case where, like in *Prairie Material Sales*, the final award was simply going to be enforced at a later date. Instead, it is one where the trial court made a conditional award of damages until it determined at subsequent status hearings whether defendant had fulfilled the requirements in the contract after the court had already found defendant in breach. Defendant could not have appealed from the June 2, 2010 order because it was not a final order. The trial court did not enter a final order until November 10, 2010, when it ruled on the issues that it referred to in its June 2, 2010 order: (1) the installation of the water and sewer lines; and (2) whether defendant had provided plaintiffs with an alternate part of his land for plaintiffs to use for storage. Since defendant timely appealed from the trial court's order on November 10, 2010 we have appellate jurisdiction over this case.

¶ 35 B. Order Barring Defense Witnesses

¶ 36 Defendant first argues that the trial court abused its discretion in barring all defense witnesses from testifying at trial when it failed to disclose its witnesses to plaintiffs. Defendant also claims that this issue presents a matter of first impression, that is, whether a party must comply with the provisions of a case management order which sets deadlines for compliance with Supreme Court Rule 213(f), when the opposing party does not issue any 213(f) interrogatories. See Ill. S. Ct. R. 213 (eff. Sept. 1, 2008). Defendant argues that there must be interrogatories issued before the duty to disclose the identity of the witnesses is required under Supreme Court Rule 213(f) (eff. Sept. 1, 2008). According to defendant, the case management order in this case sets a date to comply only if Rule 213(f) interrogatories were issued. Ill. S. Ct. R. 213(f) (eff. Sept. 1, 2008).

¶ 37 Defendant also argues that notwithstanding its failure to disclose witnesses, the trial court's decision to bar all defense witnesses is a drastic action that severely punished him because he could not put on a case without any witnesses. Specifically, defendant contends: (1) plaintiffs brought this motion three weeks prior to trial without ever filing any previous motions seeking defendant's compliance with discovery; (2) the motion to bar all defense witnesses did not contain any allegation that plaintiff had ever issued a discovery request to defendant; (3) plaintiffs did not seek an alternate form of relief in their motion; and (4) since discovery depositions had been already taken of Thomas Chummar and Peter Zasadzien plaintiffs cannot claim surprise as to their testimony, and those witnesses should have therefore been allowed to testify to the extent of their discovery depositions.

¶ 38 In response, plaintiffs do not dispute the fact that they never propounded any Rule 213(f) interrogatories on defendant. Ill. S. Ct. R. 213(f) (eff. Sept. 1, 2008). Instead, they argue that defendant's contention that he did not have an obligation to disclose witnesses absent any interrogatories being issued to him is contrary to the plain language of the case management order. Plaintiffs claim that if the portion of the case management order was contingent upon the other party issuing interrogatories then it would have said so. Plaintiffs also disagree that this issue is a matter of first impression. As support for this contention, plaintiffs cite to *Fortae v. Holland*, 334 Ill. App. 3d 705, 711-12 (2002).

¶ 39 Plaintiffs claim that defendant's failure to disclose any witnesses frustrated their efforts to prepare for trial and made it impossible for them to disclose rebuttal witnesses. They claim that it is immaterial whether they filed a motion for defendant to comply with discovery because a request for discovery is not the subject of this appeal. Instead, they claim, this appeal concerns a court order directing the parties to disclose witnesses by a certain date. Plaintiffs argue that the trial court did

not abuse its discretion is granting their motion when the record shows a disregard for deadlines, rules and orders of the court. Finally, plaintiffs claim that it is not true that the trial court's order barring defendant's witnesses prevented defendant from defending this case because defendant was able to cross-examine plaintiffs at trial make arguments to the court.

¶ 40 We initially note that we agree with defendant that the issue of whether a party must comply with the provisions of a case management order which sets deadlines for compliance with Supreme Court Rule 213(f), when the opposing party does not issue any 213(f) interrogatories, is a matter of first impression. See Ill. S. Ct. R. 213 (eff. Sept. 1, 2008). Contrary to plaintiffs' contention, this particular issue was not decided in *Fortae v. Holland*, 334 Ill. App. 3d 715, 711-12 (2002). In *Fortae*, the court noted that although the record was incomplete on the status of interrogatories, the exclusion of testimony was within the trial court's discretion because the case management order at issue *specifically required* the disclosure of certain witnesses by a specific date. *Id.* At 712. In the instant case, however, the case management order did not provide any such specific language.

¶ 41 Supreme Court Rule 218 provides that a conference will be held shortly after the filing of a case to consider, among other issues, the "deadlines for disclosure of opinion witnesses and the completion of written discovery and depositions." Ill. S. Ct. R. 218(a)((5)(iii) (eff. Oct. 4, 2002). At the case management conference, the court shall make an order which recites any action taken by the court, agreements made by the parties, and the issues for trial which were not disposed of at the conference. Ill. S. Ct. R. 218(c) (eff. Oct. 4, 2012). The case management order controls the subsequent course of the action unless modified. Ill. S. Ct. R. 218 (eff. Oct. 4, 2012).

¶ 42 Here, the case management order did not contain any language requiring the parties to disclose witnesses. Instead, the form that the parties used and which the trial court signed only

provided deadlines for the parties to comply with Supreme Court Rule 213(f). Ill. S. Ct. R. 213 (eff. Sept. 1, 2008). Supreme Court Rule 213 provides, in pertinent part: “(f) Identity and Testimony of Witnesses. *Upon written interrogatory*, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information: . . .” (Emphasis added) Ill. S. Ct. R. 213(f) (eff. Sept. 1, 2008). We interpret supreme court rules the same way we interpret statutes: *de novo*, giving the language of the rule its plain meaning. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332 (2002).

¶ 43 The plain language of Rule 213(f) makes it clear that the requirement to disclose the identity of a witness is conditioned upon the issuance of written interrogatories by the opposing party. Further, although Supreme Court Rule 218 requires that a conference will be held shortly after the filing of a case to consider, among other issues, the “deadlines for disclosure of opinion witnesses and the completion of written discovery and depositions” (Ill. S. Ct. R. 218(a)(5)(iii) (eff. Oct. 4, 2002)), the Rule simply states that at the case management conference, the court shall make an order which recites any action taken by the court, agreements made by the parties, and the issues for trial which were not disposed of at the conference. Ill. S. Ct. R. 218(c) (eff. Oct. 4, 2012). Most important, *the terms of the case management order* control the subsequent course of the action unless modified. Ill. S. Ct. R. 218 (eff. Oct. 4, 2002).

¶ 44 Here, the terms of the case management order only pertained to Rule 213(f). Ill. S. Ct. R. 213(f) (eff. Sept. 1, 2008). Since plaintiffs never propounded interrogatories upon defendant, the requirement of Rule 213 to disclose witnesses was never triggered. Ill. S. Ct. R. 213(f) (eff. Sept. 1, 2008). Accordingly, defendant did not violate the case management order when it failed to disclose its witnesses. See 10 Ill. Prac., Civil Discovery § 18:4 (2011) (“[i]t is the view of some

commentators that the provisions of Rule 213 are more specific and thus should apply and that no Rule 218 disclosures are required absent the prescribed interrogatory.”)

¶ 45 Even if we were to find that defendant violated the case management order in failing to disclose witnesses, however, the record is clear that the trial court abused its discretion in barring *all* of defendant’s witnesses at trial.

¶ 46 Supreme Court Rule 219(c) authorizes the circuit court to prescribe sanctions, including barring witnesses from testifying, when a party fails to comply with the trial court’s discovery orders. Ill. S. Ct. R. 219(c) (eff. July 1, 2002); *Nedzvekas v. Fung*, 374 Ill. App. 3d 618 (2007). The imposition of sanctions is within the discretion of the trial court and it will not be disturbed on appeal absent an abuse of that discretion. *Id.* at 620-21. In determining whether the trial court abused its discretion in applying a sanction, a reviewing court must look to the same factors that the trial court was required to consider in deciding an appropriate sanction. *Smith v. P.A.C.E.*, 323 Ill. App. 3d 1067, 1076 (2001). These factors include: (1) the surprise to the adverse party; (2) the prejudicial effect of the witness’ testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timeliness of the objection; and (6) the good faith of the party seeking to offer the testimony. *Boatman’s national Bank of Bellville v. Martin*, 155 Ill. 2d 305, 314 (1993). No single factor is determinative, and each case presents a unique factual situation which must be taken into consideration when determining whether a particular sanction is proper. *Nedzvekas*, 374 Ill. App. 3d at 621. In determining an appropriate sanction, the trial court must weigh the competing interests of the parties’ rights to maintain a lawsuit against the necessity to accomplish the objectives of discovery and promote the unimpeded flow of litigation. *Smith*, 323 Ill. App. 3d 1081.

¶ 47 We have reviewed the factors listed in *Boatman* and find that the particular sanction the trial court ordered, the barring of *all* defense witnesses, was an abuse of discretion. We make this determination based upon the fact that plaintiffs *had already deposed* two of defendant's witnesses in February 2010, Thomas Chummar, the president of defendant corporation and the person who signed the contract with plaintiffs, and Peter Zasadzien, defendant's contractor. See *Fortae v. Holland*, 334 Ill. App. 3d at 713 (it is important to remember that the clear import of Rule 218 is to avoid surprise). The plaintiffs obviously knew about the existence of these witnesses, as well as the testimony that they had given at their depositions, at least three months before they filed their motion to bar all defense witnesses. Therefore, they cannot argue that the testimony of these witnesses at trial would have caused any undue surprise and hampered their preparation for trial. The prejudicial effect of barring all defense witnesses, especially Chummar, the person who signed the agreement with the plaintiffs, greatly outweighed such a severe penalty. Based upon the record before us, it is clear that the trial court abused its discretion here. For these reasons, we reverse the trial court's order barring all defense witnesses at trial. Based upon this ruling we need not address defendant's remaining argument that the trial court's determination that it breached the contract was against the manifest weight of the evidence since we must remand this cause for a new trial.

¶ 48 The judgment of the circuit court of Lake County is reversed and remanded.

¶ 49 Reversed and remanded.